(2)

No. 91-965

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHRIST COLLEGE, INC., et al.,
Petitioners,

v.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA, et al.,
Respondents.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether parties who concede the constitutionality of government zoning and building code regulations and fail to prove any religious animus or discriminatory treatment based on religious beliefs have a viable free exercise claim.

2. Whether parties claiming a "hybrid right" have a viable free exercise of religion claim if they fail to prove either prong necessary to establish such a "hybrid right."

3. Whether the circuit court of appeals, which considered the effect of ordinances and regulations as applied to the specific conduct of particular individuals, has only resolved the case on a "facial" basis.

4. Whether parties asserting a free exercise claim have established a constitutionally significant burden on free exercise rights when there is no religious belief which prevents compliance with any governmental requirement.

PARTIES TO THE PROCEEDINGS

The County Respondents[1/] agree with the listing of parties by the Petitioners[2/] except as follows:

1. Three of the members of the Board of Supervisors originally sued in their official capacities by the Petitioners are no longer members of the Board of Supervisors. Those Board members are Audrey C. Moore, Martha V. Pennino and Lilla Richards. Pursuant to U.S. Supreme Court Rule 35.3, Robert B. Dix, Jr., Ernest J. Berger and Christine R. Trapnell are automatically substituted as parties.

1/ This Brief in Opposition is submitted on behalf of the County Respondents, i.e., the Board of Supervisors of Fairfax County, Virginia, the individual members of the Board and the County Executive.

2/ References will also be made herein to the Thoburns and Drydens as "the Thoburns" and to the County Respondents as "the County." The Town Respondents will be referred to separately or as "the Town."

2. Petitioners list Christ College, Inc., as a party to these proceedings even though it was dismissed by the trial court based on a lack of standing. J.A. 24-53, 221-22, 1163-1217, 1275. The Fourth Circuit affirmed the ruling on standing as to Christ College, Inc. (Pet. App. 19a), and the Petitioners have not presented any question or made any argument before this Court regarding the ruling on the standing issue. As a result, it is obvious that Christ College, Inc., has no interest in the outcome of the Petition, and a notice to that effect should have been served by the Petitioners pursuant to U.S. Supreme Court Rule 12.4.[3/]

3/ Citations to various documents shall be made as follows: the Joint Appendix presented to the Fourth Circuit: "J.A."; the Petition for Writ of Certiorari: "Pet."; the Appendix to the Petition: "Pet. App."; the Appendix to this Brief in Opposition: "App."; and the Thoburns' Brief in the Fourth Circuit: "Brief."

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STATUTES AND RULES

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant excerpts from the following authorities, omitted by Petitioners, are set forth verbatim in the Appendix hereto:

Va. Code § 15.1-431 (Supp. 1991)

Va. Code § 15.1-446.1 (Supp. 1991)

Va. Code § 15.1-491 (1991)

Va. Code § 15.1-496 (1989)

Va. Code § 15.1-499 (1989)

Zoning Ordinance of Fairfax County, Virginia (Reprint 1988; Supp. Nos. 22, 26 and 27, 10/31/88, 12/11/89 & 3/26/90), Articles 2, 4, 5, 9 and 20 (excerpts)

STATEMENT OF THE CASE

On August 1, 1989, this suit was filed by the Petitioners, who claimed violations of their rights to the free exercise of religion, equal protection and due process, violations

of the Establishment Clause,[4/] and a conspiracy.[5/] The named defendants were the Board of Supervisors of Fairfax County, Virginia ("the Board"), the individual Board members, the County Executive, the Town of Vienna and the Vienna Board of Zoning Appeals ("Town BZA"). J.A. 21.

Trial commenced on May 7, 1990, and ended on May 9, 1990, when the court granted the County's and Town's motions for directed verdicts. J.A. 2067-72. The Thoburns' evidence revealed or, when specifically noted, failed to reveal, the following.

4/ The Petition does not challenge the dismissal of the equal protection and due process claims. In addition, the only question presented regarding the Establishment Clause relates to an action of the Vienna BZA and does not affect the County in any way. Pet. 29-30. Thus, the County Respondents need not and will not address such issues.

5/ The dismissal of the conspiracy claim was not challenged in the Fourth Circuit and is not challenged in the Petition.

Robert Thoburn started Fairfax Christian School ("FCS") in 1961 in what was then the Town of Fairfax. J.A. 1518, 1589. FCS was located on commercial property and secured annual zoning permits. J.A. 1589-90. There was no evidence establishing that this property, or any other, had any religious significance for the Thoburns.

FCS moved to Fairfax County in 1964, after securing a special permit from the Fairfax County Board of Zoning Appeals ("County BZA") for property located on Popes Head Road ("Popes Head"). J.A. 1519-20, 3206-08. The Thoburns later secured additional special permits from the County BZA to expand the size of FCS. J.A. 1520, 1590, 3210-12, 3214, 3217, 3265-72.

FCS operated at Popes Head from 1964 to 1984, when its enrollment exceeded 500 students. J.A. 1522-23, 1758. FCS is and has been a for-profit business enterprise since its inception and is not tax-exempt. J.A.

1595-96, 1617, 3216. Robert Thoburn's wealth increased from less than $1,000 in 1961 to over $10 million in the 1980s. J.A. 1514, 1519.

FCS is one of dozens of Christian schools in the County. J.A. 1764. FCS is not affiliated with a church and does not teach the tenets of any religious denomination. J.A. 1742, 1932. The Drydens hold no religious belief that requires their children to be educated at FCS. J.A. 1823-24.

In 1984, the Thoburns sold the FCS campus at Popes Head for $3 million without making the sale contingent upon approval of a new permanent home for FCS. J.A. 1523-24, 1591.

THE ZONING PROCESS

FCS is a private "school of general education" under the Fairfax County Zoning Ordinance. App. 44a. As such, FCS, like any other private school, must secure approval of a special exception ("SE") from the Board of Supervisors to operate with 100 or more

students on property zoned for residential uses. J.A. 1530-31; Pet. App. 47a, 49a, 53a-54a. One seeking an SE must file an application with supporting plans and information regarding the proposed use. J.A. 1531-32. A report is prepared by the County's planning staff, and the Planning Commission holds a public hearing after giving public notice and makes a recommendation to the Board of Supervisors. J.A. 1532-33. The Board also gives public notice and holds a public hearing on the SE application. J.A. 1534. There are secular standards specified in the Ordinance which the application must satisfy. App. 41a-44a; Pet. App. 56a, 58-59a.

The Fairfax County Zoning Ordinance permits private schools as a matter of right without an SE in all commercial zoning districts. J.A. 1628; App. 13a-23a. Private schools are also permitted uses in office or industrial parks in industrial districts. App. 24a-39a. Operation of FCS on commercial

property would not violate the Thoburns' religious beliefs, and they presented no evidence that operating on industrial property would offend their beliefs. J.A. 1589-90, 1667, 1823.[6/]

THE OAKTON PROPERTY

In February 1985, the Thoburns purchased approximately 59 acres of property in the Oakton area of Fairfax County ("the Oakton Property"). J.A. 3278-79. The Oakton Property is zoned R-1 (Residential, one dwelling per acre), a low density district,

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6/ The broad statement in the Petition that "most industrial and commercial land would not be suitable for a school" is misleading and unsupported by the evidence. Pet. 22 n.21. There was no evidence that any witness had examined any, much less most or all, non-residentially zoned land in the County to determine suitability for use as a school. The Thoburns' attempt to claim that the County itself could locate "only two such potential parcels" (Pet. 22-23 n.21) is also misleading because the Thoburns desired an existing building, not vacant land, which had to be at low cost in a limited area of the County. J.A. 1721-23.

and for many years had been planned for even lower density development with no intrusions allowed into the Environmental Quality Corridor ("EQC"). J.A. 1619, 3332, 3337-41; Pet. App. 47a-52a.[7/] The Thoburns purchased the Oakton Property without a contingency for SE approval and willingly took that risk. J.A. 1614-16; see also J.A. 3217.

The Thoburns submitted an SE application (SE 85-P-008) for FCS in 1985 for 576 students in a proposed 32,000-square-foot building on 37.51 acres of the 59-acre Oakton Property. J.A. 3281, 3285, 3289, 3293. There is no religious significance to the number of students at FCS. J.A. 1601-02. The Thoburns

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7/ An EQC is an environmentally sensitive area consisting of floodplain and/or steep slopes. J.A. 1530, 1593, 1968, 3228-29, 3337-41. Va. Code § 15.1-490 (1989) requires the Board to give reasonable consideration to the "preservation of flood plains" in zoning matters. Pet. App. 33a. Va. Code § 15.1-446.1 (Supp. 1991) requires the adoption of a Comprehensive Plan by all counties. App. 4a-7a.

and Drydens have a total of 27 children, not all of whom attend FCS. J.A. 1601.

The County's planning staff and the Planning Commission recommended denial of SE 85-P-008 on numerous grounds: e.g., that the intensity of the FCS use would violate the Comprehensive Plan, which serves as the County's guide to future development; that the application did not satisfy all applicable zoning standards; and that it proposed a major disturbance of an established EQC. J.A. 1536-37, 1605, 2450, 3281-3322.

One concern was the Thoburns' plan to clear and grade large areas of the floodplain for the construction of ballfields, a consistent County concern. J.A. 1536-37, 1603-05, 1617, 2004, 3288. The Thoburns' own land use planner recommended that the ballfields be removed from the floodplain. J.A. 1606. However, the Thoburns did not remove the ballfields from the floodplain. The Thoburns offered to reduce the size of FCS

to 480 students. J.A. 1602-03, 1606, 2003-07, 3323. Thoburn did not present the Board with any land use or technical studies showing that his proposed intrusion into the EQC would not degrade the environment. J.A. 1605-06. The Board held a public hearing and did not approve the SE. J.A. 1534-35, 3323-27.

On February 3, 1987, Thoburn filed a second SE application (SE 87-P-006) for FCS for the Oakton Property (J.A. 1535-37), which was substantially similar to the original 1985 application in that it again proposed 576 students with ballfields in the EQC. J.A. 1602-05, 2003-07, 3332-37. The Comprehensive Plan had not changed as to the Oakton Property from 1985 to 1987. J.A. 1619-20. The planning staff and the Planning Commission recommended denial based on concerns similar to those expressed in 1985. J.A. 1536-37, 1605, 3281-89, 3334-47. On August 3, 1987, the Board of Supervisors denied SE 87-P-006 after holding a public hearing. J.A. 1537,

3377-3503. The Board's denial was based on secular reasons. J.A. 1537, 3491-98D.[8/]

INTERIM SITES

After the sale of Popes Head in 1984, FCS leased portions of Jerusalem Baptist Church and Temple Baptist Church in Fairfax County as interim sites. J.A. 1171, 1525-26, 3280. The leases for the sites were for terms of one year. J.A. 3375-76, 3507-08.

On March 4, 1988, the Fairfax County Office of Assessments sent a letter to Jerusalem Baptist inquiring into the substance of its lease with FCS.[9/] J.A. 3505. The

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8/ The claim in the Petition that the Thoburns presented evidence "of county approval of school uses that created greater intensities of use, traffic and environmental effects" (Pet. 6) is misleading and inaccurate. None of the properties referred to by the Thoburns at the public hearing were ever shown to be similarly situated with the Oakton Property.

9/ Tax-exempt property such as Jerusalem Baptist's cannot be leased for profit or otherwise generate revenue and retain full tax-exempt status. Va. Code § 58.1-3603 (1991). Pet. App. 44a-45a.

Thoburns offered to pay any taxes incurred as a result of the lease. J.A. 1595. Jerusalem Baptist did not renew the lease. J.A. 1547.

The property of the Jerusalem Baptist Church was zoned in the R-C District. J.A. 1540. A private school of general education was not allowed in the R-C District in 1984, either as a matter of right or with a special exception. J.A. 1540. County zoning enforcement officials knew that FCS was in violation of the Ordinance at the Jerusalem Baptist site and never took any legal action against the Thoburns or Jerusalem Baptist to abate the violation. J.A. 1539-41, 1597.

The Thoburns failed to present any evidence that FCS could not return to Temple Baptist Church in the Fall of 1988 or that the County had anything to do with their lease at that site. In fact, the Thoburns never provided any evidence to explain why FCS did not reopen at Temple Baptist Church.

HUNTER MILL

In February 1988, before the letter from the Office of Assessments to Jerusalem Baptist Church, the County, at the Thoburns' request, had performed a "team inspection" on two residential homes located on certain property owned by the Thoburns on Hunter Mill Road (hereinafter "Hunter Mill").[10/] J.A. 1548, 1550, 1608-09. The purpose of the team inspection was to determine what physical changes would be needed to convert the houses to meet building code requirements for a school. J.A. 1550, 1641-42, 1659-60, 1781, 1989-90. Robert Thoburn had known the purpose of team inspections since at least 1984, and he knew that such inspections do not involve zoning issues. J.A. 1597, 1626.

10/ Hunter Mill is zoned R-E (Residential Estate), a low density area permitting one dwelling per two acres. J.A. 3566, 3589.

In May/June 1988, Robert Thoburn secured residential building permits from the County to renovate three houses at Hunter Mill. J.A. 1550, 1553, 3524, 3526. Thoburn's plans showed bedrooms, living rooms, etc., not classrooms. J.A. 1610-13. In submitting his permit applications, Thoburn certified: "the information is complete and correct, and that if a permit is issued the construction and/or use will conform to the building code, the zoning ordinance and other applicable laws and regulations . . . ." J.A. 1631. Thoburn's building permits clearly indicated that he proposed only single-family residential uses in the three homes at Hunter Mill. J.A. 1915-18.

The Thoburns never intended to use Hunter Mill for residential purposes. J.A. 1613. Their plan was to renovate the houses under residential permits to meet code requirements for a school and then move FCS into the houses

before securing an SE. J.A. 1551-52, 1554.[11/] Thoburn's own fire and life safety expert testified that the County customarily relied upon all representations made in permit applications and that County procedures did not allow any non-residential occupancy under residential permits. J.A. 1914-18. The Thoburns were "well aware" of the SE requirement. J.A. 1864-65.

In late August 1988, the Thoburns told the Fairfax County Executive that they intended to open FCS without an SE. J.A. 1554-55. The Thoburns intended to open FCS at Hunter Mill on September 7, 1988, a date with no religious significance for the Thoburns. J.A. 1175, 1766-68, 1825-27, 2028-29, 3525.

11/ The building code requirements for schools are more demanding than those for residences. The code does not preclude a residence from exceeding residential requirements. Inspections under residential permits only evaluate compliance with residential requirements. J.A. 1915.

ISMAN

On September 1, 1988, the County Fire Marshal, Warren E. Isman, the Building Official and the Zoning Administrator filed suit in the Fairfax County Circuit Court to prevent the Thoburns from opening FCS at Hunter Mill without an SE and in violation of the building code.[12/] J.A. 1175, 1241, 1862-63.

The Thoburns' constitutional rights were raised at the September 13, 1989, trial of the Isman suit. J.A. 1632, 1866-68. The Thoburns claimed that the buildings were safe and that FCS was in an "emergency" situation. J.A. 1865, 1868. The state circuit court rejected all of the Thoburns' contentions and ruled for the County, finding that Hunter Mill was not safe for use as a school, and that the Thoburns were themselves responsible for

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12/ The County's suit was referred to at trial and shall be referred to herein as the "Isman" suit.

creating their own "emergency." J.A. 1867-68; see J.A. 2067-68, App. 45a-51a. The Thoburns appealed that decision to the Supreme Court of Virginia and lost. J.A. 1866. The Thoburns did not pursue the matter to this Court.

The Thoburns' own expert testified that, two days after the Circuit Court's Isman decision, numerous building code violations existed at Hunter Mill which "could be reasonably determined to be significant" fire and life safety issues. J.A. 1913-14.[13/]

13/ The Thoburns' statement on page 11 of the Petition that "[t]he County Executive actually suggested that Fairfax Christian School be housed in a run-down, bullet-ridden vacant building in a crime- and drug-infested commercial area at Bailey's Crossroads" is particularly misleading and irrelevant. The County Executive had attempted to assist the Thoburns in finding a temporary home for FCS while they applied for a special exception. J.A. 1723. The Thoburns had told the County Executive that they did not want to spend "an awful lot of money in the interim time frame" and that "he needed to be centrally located if

(footnote continued on next page)

VIENNA ASSEMBLY OF GOD CHURCH

After Isman, the Thoburns located their entire school (225 students, grades K-12) in Vienna at the Vienna Assembly of God Church ("VAGC"). J.A. 1560. The VAGC is located in a commercial area, and half of its property is zoned for commercial uses. J.A. 1560, 1667, 1848-50. Vienna is a town in Fairfax County,

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13/ (cont'd) possible." J.A. 1723. Based on staff research, a "couple of places" were identified: an existing warehouse which "could be converted easily to a school facility" and a former school in the Bailey's Crossroads area. J.A. 1722. There was no evidence at trial of any crime statistics in the Bailey's Crossroads area for 1988 or of any drug activity in the area of the former school in that time frame. Whereas the County Executive's voluntary attempt to assist the Thoburns was unsuccessful, there was no evidence that he had successfully assisted any other private school under similar circumstances. Furthermore, it must be recalled that it was the Thoburns who had placed themselves in a situation where they had no approved location for their school with the misguided notion that they were exempt from the County's zoning and building code regulations. Finally, the Thoburns fail to explain how the County Executive's attempt to assist them is relevant to the question of whether the County's Zoning Ordinance and Building Code regulations have been discriminatorily applied to them.

with a Town Council and a Town BZA. Vienna has had County officials provide building inspections pursuant to a long-standing agreement. J.A. 1799-1800, 2631-32. County officials made a team inspection of the VAGC for the Thoburns in May 1988 for 49 students. J.A. 1640-42, 1659-61, 2198-2202.

On July 20, 1988, the Town BZA approved FCS's application for a conditional use permit for 49 students, grades K-1, in the VAGC basement. J.A. 1662-63, 3809. On September 19, 1988, the Thoburns applied for a temporary use permit for 175 more students at the VAGC. J.A. 1673. The next day, with no approval of the request for 175 additional students and no occupancy approval for even 49 students, and without consulting the fire marshal, the Thoburns moved their entire school onto all floors of the VAGC. J.A. 1560, 1643-44, 1694, 1780, 1782-88. The Thoburns knew such action violated their conditional use permit. J.A. 1644, 1778-79.

On September 21, 1988, County fire officials inspected the VAGC at the Town's request. County fire technician Timothy Sparrow ordered FCS to evacuate the VAGC premises. J.A. 1677, 1793-95, 1801. The Thoburns refused to comply with the evacuation order and opened the school the next day. J.A. 1647-48, 1783, 1791. The Thoburns' own expert inspected the VAGC on September 22, 1988, and determined that numerous building code violations existed. J.A. 1897, 3794-3802. The expert testified at trial that significant and serious code violations impaired the fire and life safety of the occupants of the VAGC, and that "a reasonable inspector could note the accumulative [sic] code issues and looked [sic] to issue an evacuation order." J.A. 1919-21, 3794-3802. Vienna sought and was granted an injunction from the Fairfax County Circuit Court to preclude further FCS operations at the VAGC

without all necessary permits and approvals. J.A. 1179-81. FCS continued to operate at the VAGC with over 200 students until the injunction ruling. J.A. 1649.

FCS was allowed to occupy the VAGC with 49 students on September 29, 1988, and with all students two weeks later once the Thoburns had substantially complied with all zoning and building code requirements. J.A. 1182, 1681, 1714, 1753.

THE HUNTER MILL SPECIAL EXCEPTION

On December 9, 1988, months after Isman, the Thoburns finally applied for an SE for FCS (310 students) in 14,915 square feet of building space on 29.15 acres at Hunter Mill. J.A. 1576, 3558-59, 3565. Hunter Mill is located near a major highway, the Dulles Toll Road, and existing office and industrial uses. J.A. 3566, 3578. The County planning staff recommended approval, with conditions. J.A. 1576, 3560-82. The Board of Supervisors approved the Hunter Mill SE on May 8, 1989,

subject to certain conditions related to the public health, safety and general welfare. J.A. 2002-03, 2007-12, 3784-87.

THE THOBURNS' RELIGIOUS BELIEFS

The fact that the Thoburns have certain religious beliefs must be taken as true. However, in addition to the religious beliefs set forth in the Petition, the evidence at trial also established the following with respect to the Thoburns' beliefs.

The Thoburns have never asserted or established that their religious beliefs require that they operate FCS on any particular property or that they operate only on property zoned for residential uses. To the contrary, Robert Thoburn testified that the operation of FCS on property zoned for commercial uses did not violate his religious beliefs. J.A. 1589-90. The Thoburns have not asserted any religious belief forbidding them from operating FCS on property not zoned for residential uses. The Thoburns conceded

before the Fourth Circuit that "they do not have religious objections to all of the specific requirements of the zoning and building regulations at issue in this case." Pet. 21 n.18. The record is devoid of any evidence that the Thoburns have any religious objection to any specific requirement of the County's zoning and building regulations.

Robert Thoburn, the owner of FCS, testified that he could not think of any situation with regard to Fairfax County or any Fairfax County officials in which he violated his religious beliefs. J.A. 1588. He testified that going through the County zoning process to secure special permits to operate FCS in the 1960s did not violate his religious beliefs. J.A. 1588. He further indicated that the submission of site plans for the development of FCS at Popes Head did not violate his religious beliefs. J.A. 1588. In light of such testimony, it must be concluded that the Thoburns' submission of applications

for special exceptions to operate FCS at the Oakton Property and at Hunter Mill did not violate his religious beliefs. Also, the Thoburns have not asserted any religious belief which would preclude them from complying with any and all of the conditions connected with the approval of their special exception to operate FCS at Hunter Mill.

Regarding the Oakton applications, Robert Thoburn testified that there was no religious significance to having ballfields in the floodplain at that site, no religious mandate requiring the clearing of hundreds of trees to locate such ballfields, and no religious significance to any particular number of ballfields. J.A. 1616.

Concerning FCS operations generally, Robert Thoburn's testimony at trial established that there is no religious significance to any particular number of students at FCS. J.A. 1601-02. There is no

religious significance to opening FCS on September 7 or any other date. J.A. 1768-69.

Finally, Glenn Dryden has neither any religious belief requiring the education of his children on any particular piece of property nor any belief requiring their education only at FCS. J.A. 1823-24.

THE THOBURNS' APPEAL TO THE FOURTH CIRCUIT

The Thoburns appealed the directed verdict decision of the district court to the Fourth Circuit on its free exercise, equal protection, due process and Establishment Clause claims. The Thoburns' appeal to the Fourth Circuit also challenged the district court's decision to exclude certain evidence at trial as well as numerous other pre-trial procedural rulings. The Fourth Circuit affirmed all of the substantive and procedural rulings of the district court. Pet. App. 1a-23a. The Fourth Circuit reviewed the voluminous record and concluded that the Thoburns had "failed to establish the first

element in any free exercise claim: they have not proved that the zoning laws or fire codes burden their exercise of religion." Pet. App. 8a. It also concluded that the Thoburns failed to establish either that they were "subjected to discriminatory treatment vis-a-vis another similarly situated party" or that there was any "discriminatory animus" on the part of the County. Pet. App. 10a-11a.

SUMMARY OF REASONS FOR DENYING THE PETITION

The Fourth Circuit fully and fairly reviewed the record and properly decided that the County's application of zoning and building ordinances and regulations to the Thoburns did not impose any constitutionally significant burden on their free exercise of religion. The Fourth Circuit's decision is consistent with this Court's precedents, and the Thoburns have failed to identify any aspect of the decision which is in direct conflict with decisions of other courts. The Thoburns' Petition, to a great extent, is

based on improper characterizations and unfounded assumptions relative to the decision of the Fourth Circuit. In addition, the Thoburns fail to challenge the exclusion of evidence and yet attempt to rely on that same evidence in this Court.

Based on the Thoburns' own evidence, it is clear that they could have, without any offense to their religious beliefs, complied with all of the County's ordinances and regulations. Their own proof demonstrated that when the Thoburns have complied with the County's reasonable and valid zoning and building regulations, FCS has flourished. In the absence of any constitutionally significant burden, (Question Presented # 3), this case does not involve a viable free exercise of religion claim, and there can be no "hybrid right." As a result, this case is simply a garden variety zoning case which does not raise any important constitutional issues for this Court.

I. PARTIES WHO CONCEDE THE CONSTITUTIONALITY OF GOVERNMENT ZONING AND BUILDING CODE REGULATIONS AND FAIL TO PROVE ANY RELIGIOUS ANIMUS OR DISCRIMINATORY TREATMENT BASED ON RELIGIOUS BELIEFS DO NOT HAVE A VIABLE FREE EXERCISE CLAIM.

The Thoburns concede that the County's laws and regulations are constitutional. Pet. 20. It is clear that the Thoburns have decided to allow their free exercise claim to rest solely on their argument that the County and Vienna discriminatorily applied and enforced the applicable ordinances and regulations. Pet. 15 n.11, 20-21, 22 n.20, 23.

The Thoburns' argument that the County's ordinances and regulations were applied to them in a discriminatory manner is unsupported by any substantial evidence in the record. In essence, the Thoburns are asking this Court to grant them a writ of certiorari based on a record which they never established at trial. A review of certain aspects of particular claims of discrimination is enlightening.

The Thoburns argue that the denials of their special exception applications for the

Oakton Property were "pretextual." Pet. 25. Their evidence showed, however, that there were legitimate secular reasons (e.g., significant intrusions into an established EQC and intensity of the proposed use) supporting the denials of those applications in a low-density residential area and that both the County professional planning staff and the Planning Commission had recommended denial of those applications. The record is devoid of any evidence showing that such environmental and land use issues were not of any concern to the Board in the review of a special exception application for any other private school on any similarly situated property. The record is devoid of any evidence which showed that any other private school was approved in the vicinity of the Oakton Property with the same environmental and intensity problems. In fact, the record revealed that the application for FCS was approved when the Thoburns sought a special exception for a less intense use at

Hunter Mill with no encroachment in an EQC. J.A. 3566-3571, Pet. App. 60a-65a. Finally, the Thoburns admit that their claim of a "pretext" is based on evidence which was excluded at trial. Pet. 25 n.25. The Fourth Circuit affirmed the trial court's evidentiary ruling (Pet. App. 17a), and the Thoburns do not challenge that ruling in this Court. Accordingly, the Thoburns' argument is improperly based on excluded evidence.

The Thoburns attempted to show at trial that their applications for the Oakton Property were treated unfairly when compared to other land use requests. The trial court excluded the evidence the Thoburns sought to present, primarily because of the Thoburns' failure to establish that these other properties were "similarly situated." J.A. 1946-1983. The Fourth Circuit affirmed these evidentiary rulings in all respects. Pet. App. 14a-16a. The Thoburns cannot rely on evidence which was excluded at trial when the

exclusion was upheld on appeal and they make no attempt to challenge any evidentiary rulings in this Court.

The Thoburns also claim "harassment" based on an inquiry sent to Jerusalem Baptist Church by the County's real estate assessment office. Pet. 25. The letter in question simply requested information from the Church because FCS, which was not a tax-exempt entity, was leasing or using tax-exempt property to conduct its private school. J.A. 1595, 3505. The Fourth Circuit recognized that the letter was proper under Virginia law. Pet. App. 4 n.1. The Thoburns never called as a witness the author of the letter, any other official from the assessor's office or anyone from Jerusalem Baptist Church. Furthermore, the Thoburns did not present any evidence showing more favorable treatment for any similarly situated property. The Thoburns misrepresent the facts when they assert that

the inquiry from the assessment office constituted "harassment."

The Thoburns also claim that the Isman suit was "unprecedented" and "unwarranted." Pet. 8, 25. The Thoburns' own evidence revealed that they had secured residential building permits for their renovations which showed bedrooms, living rooms, etc., not classrooms, and that they never intended to use the buildings for residential purposes. J.A. 1550-54, 1610-13, 3524, 3526. Further, they intended to open FCS without a special exception on September 7, 1988, a date with no religious significance for the Thoburns. J.A. 1175, 1554-55, 1766-68, 1825-27, 2028-29, 3525. The Isman suit was filed on September 1, 1988, and the Thoburns' own fire and life safety expert at trial in the case at bar testified that, as late as September 15, 1988, numerous building code violations existed at Hunter Mill which "could be reasonably determined to be significant" fire and

life safety issues. J.A. 1175, 1241, 1862-63, 1913-14. Instead of being "unwarranted," the record clearly reveals that the filing of the suit in Isman was totally justified.

The Thoburns failed to present any evidence at trial to show that any other private school had secured residential building permits under false pretenses and either had intended to open or did open such a school without first securing approval of a special exception and complying with the building code. The Thoburns' claim that the filing of the Isman suit was "unprecedented" is a claim without any substance because, as the Fourth Circuit found, they failed to present any evidence of disparate treatment or religious animus on the part of the County. Pet. App. 11a. If anything, there was disparate treatment in favor of the Thoburns at Jerusalem Baptist Church, where they operated FCS illegally and the County took no legal action. J.A. 1539-41, 1552, 1597.

The Thoburns' pleadings asserted that the actions relating to the VAGC were "arbitrary and unreasonable" and were taken "without consideration of the religious interests at stake . . . ." J.A. 1199. The first part of this claim was affirmatively disproven by their own expert witness, and the second part is diametrically opposed to the Thoburns' argument in this Court that Isman was filed because of their religious beliefs.

Finally, the Thoburns claim that they were harmed by the County, even when the Board approved their special exception application for 310 students at Hunter Mill in May 1988, due to the imposition of "expensive and unwarranted" conditions. Pet. 26. A review of the conditions imposed by the Board reveals no religious animus, only secular concerns. Pet. App. 60a-65a. The record is devoid of

any evidence detailing the Thoburns' monetary cost in satisfying any particular condition[14/] or of any evidence that any particular condition was "unwarranted." Instead of SE conditions being unusual, the imposition of standard conditions and others which are uniquely tailored to the site is a common practice in the County. J.A. 2011.

The Thoburns never explain to this Court where the record supports their assertion that the Board's conditions were improper. To the contrary, the record reveals that: 1) the Thoburns agreed to construct the left turn lane; 2) the condition requiring consolidation of entrances is "very common" and is for "safety purposes"; 3) the condition requiring site plan approval (Condition #3) is "standard"; and 4) the condition limiting the

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14/ In any event, the monetary cost of satisfying a governmental requirement does not impose a constitutionally significant burden. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990).

hours of operation is "very common." J.A. 1634, 2008, 2011, 2012.

Having conceded that the County's ordinances are constitutional as drafted, the Thoburns are, in essence, asking this Court to grant a writ of certiorari for a case of "religious discrimination" which does not exist. The record does not support the Thoburns' claim that they have been singled out for disparate treatment or religious animosity relative to the County's admittedly constitutional ordinances. The Fourth Circuit correctly concluded that the Thoburns failed to prove that they had been "subjected to discriminatory treatment vis-a-vis another similarly situated party," that there was "any religious animus on the part of the town or the county," or that there was "any evidence at all of legislative animus toward religion or any religious group." Pet. App. 10a-11a. Significantly, none of the questions presented

by the Thoburns in their Petition seek to challenge these particular conclusions by the Fourth Circuit. Based on this fact alone, this Court should deny the Thoburns' Petition.

Even if this Court were inclined to grant the Petition, it is clear from this record that the Court would be unlikely to reach the free exercise issues asserted by the Thoburns because the very underpinning of those legal arguments (that they have proven a case of religious discrimination) is not supported by the evidence admitted at trial. In fact, the Thoburns' own evidence affirmatively revealed fair treatment by the County within the bounds of admittedly constitutional ordinances.

II. PARTIES CLAIMING A "HYBRID RIGHT" HAVE NO VIABLE FREE EXERCISE OF RELIGION CLAIM IF THEY FAIL TO PROVE EITHER PRONG NECESSARY TO ESTABLISH SUCH A HYBRID.

The first reason argued by the Thoburns for granting the Petition in the case at bar is based upon their contention that this is a

"hybrid rights" case. Pet. 15. This contention has no merit.

In addition, the Thoburns' contention that the Fourth Circuit's decision is in conflict with those of other courts on the "hybrid rights" issue is also unfounded because: 1) the Fourth Circuit determined that it did not need to decide the "hybrid rights" issue because it concluded that the Thoburns failed to prove any burden on their free exercise of religion; 2) the cited cases are distinguishable on their facts; 3) none of the cited cases substantively conclude that under their facts any such "hybrid rights" exist and that strict scrutiny was required; and/or 4) references to "hybrid rights" in many of the cited cases are dicta.

This Court has ruled that a religion-neutral, generally applicable law does not implicate any free exercise rights. Employment Division, Dep't of Human Res. v. Smith, 494 U.S. ___, 110 S. Ct. 1595 (1990).

Smith recognized that the only decisions in which this Court has held that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ." 110 S. Ct. at 1601. This Court referred in Smith to a "hybrid situation." 110 S. Ct. at 1602. The Thoburns refer to "hybrid rights," and implicitly maintain that Smith created a new constitutional right. Pet. 14-19.

The Thoburns now claim that the case at bar involves two types of "hybrid rights," one rising out of the "free speech" line of cases and the other rising out of the "parental rights" line of cases. Pet. 17. As to the "free exercise/free speech" hybrid now asserted by the Thoburns, it must be noted that their suit never included any free speech

claim. J.A. 24-53.[15/] With regard to their claim of a "free exercise/parental rights" hybrid, the Thoburns never pled any such separate and distinct count for such a claim in the trial court. J.A. 24-53. Even if the Thoburns had pled more than a straight free exercise claim, it is clear that they have a fundamental misunderstanding of the fact that a "hybrid right" necessarily requires a proper foundation of both prongs of such a hybrid. Having failed to show any constitutionally significant burden on their free exercise rights and any violation of parental rights, the Thoburns did not even come close to satisfying either prong of any "hybrid right."

15/ The County Respondents will not respond to Thoburns' brief reference to a "free exercise/free speech" hybrid because of their failure to fully assert such a claim either in the trial court or at the Fourth Circuit.

The Thoburns argue that their "free exercise/parental rights" hybrid is supported by Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Wisconsin v. Yoder, 406 U.S. 205 (1972). Pet. at 16-17. However, neither Pierce nor Yoder offer any such support.

Yoder involved a compulsory school attendance law which required children to attend school until reaching age 16. Yoder genuinely believed that his children's attendance at any high school, public or private, was contrary to the fundamental tenets of the Amish faith. 406 U.S. at 210, 217. This Court noted the effect of the attendance law in Yoder by stating that:

> [t]he impact of the . . . law on [Yoder's] practice of the Amish religion is not only severe, but inescapable, for the . . . law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.

Id. at 218. (Emphasis added).

Further, the decision in Smith recognized the following language in Yoder:

> when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.

110 S. Ct. at 1601 n.1 (citing Yoder) (emphasis added). The Thoburns' free exercise claim does not even come close to the nature of the Amish claim in Yoder. The Thoburns could have complied with all of the County's regulations without offending any of their religious beliefs. The Amish litigants in Yoder, unlike the Thoburns, were placed on the horns of a dilemma: they could not comply with the attendance law without violating their religious beliefs. Finally, Yoder emphasized that the "convincing showing" of the Amish was "one that probably few other religious groups or sects could make." 406

U.S. at 235-36. No such convincing showing was ever made by the Thoburns.

Similarly, the Thoburns' case fails to establish any violation of "parental rights" as was involved in Pierce. The issue in Pierce was whether Oregon had the power to mandate public school education and require the "destruction of appellees' primary schools . . . ." 268 U.S. at 534. Pierce held that the Oregon law unreasonably interfered with the liberty of parents to direct the education of their children and stated that constitutional rights "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." 268 U.S. at 535. This Court overturned the Oregon law on due process grounds because application of the law mandated education at public schools and prohibited parents from having their children attend any private school.

The case at bar does not involve the type of drastic regulation ruled invalid in Pierce. The Thoburns' evidence did not show that FCS was regulated out of existence or that any religious beliefs would be offended by their compliance with the law. Instead, the Thoburns proved that FCS is permitted, as a matter of right, in numerous non-residential districts, and that they have obtained zoning approvals on a number of occasions. However, on other occasions the Thoburns chose, after voluntarily selling their existing school for $3 million without a ready replacement, to ignore reasonable and valid zoning and building regulations.

The Thoburns' arguments before this Court also defy logic as they attempt to conclude that any religious use which involves a parent's right to raise children, automatically qualifies for strict scrutiny analysis. It matters not to the Thoburns that they can comply with the County's laws and

regulations without violating their religious beliefs. Smith recognized that because we value a wide diversity of religious preferences, "we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." 110 S. Ct. at 1605. (emphasis in original).

The weakness of the Thoburns' argument is abundantly clear when their facts are contrasted with those in Smith. In Smith the state of Oregon criminalized the ingestion of peyote, a sacramental rite in the Native American Church. This Court concluded that this sacramental rite could be prohibited, without offending free exercise rights, because the criminal statute was a neutral, generally applicable law.

Like the criminal statute in Smith, the County's zoning and building code regulations are neutral and generally applicable to all

persons, regardless of religion. The Thoburns failed to establish any religious animus or disparate treatment regarding how those laws were applied to them. Pet. App. 10a-11a. The Thoburns have not asserted any religious belief which either compels them to violate the County's laws or which restrains compliance on their part. This Court noted in Smith that its decisions have

> consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'

110 S. Ct. at 1600. This Court also stated that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Id.

The Thoburns fail to explain why the state of Oregon can absolutely prohibit a

sacramental rite of one religion, while at the same time the County cannot require FCS to satisfy basic zoning, building, fire and safety codes which do not offend anyone's religious beliefs. The Thoburns ask this Court to declare FCS a law unto itself, such that they can pick and choose among the County's laws to determine the ones with which they wish to comply and those they wish to violate. Such a conclusion would result in the same "constitutional anomaly" that this Court disavowed in Smith. 110 S. Ct. at 1604.

The Thoburns' attempt to claim that the decision of the Fourth Circuit is in conflict with the decisions of other courts is equally unpersuasive. There is no conflict because the Fourth Circuit concluded that it did not need to decide any issue of "hybrid rights" because the Thoburns' evidence failed to show that there was any constitutionally significant "burden" upon their exercise of religion. Pet. App. 8a. The Thoburns' claim

of a conflict among the circuits regarding the recognition of "hybrid rights" (Pet. 15, 19) is also misleading because their own question presented relies not only on the "recognition of hybrid rights," but also its claim that strict scrutiny automatically applies. Pet. i. Even if the Fourth Circuit had concluded that no "hybrid right" exists in the present case, the Thoburns fail to cite any case from any other lower court which finds, under similar circumstances, the existence of such a "hybrid right" and that strict scrutiny automatically applies.

One of the very cases cited by the Thoburns as being in "conflict" with the Fourth Circuit's decision is, if anything, totally consistent. In Salvation Army v. New Jersey Dep't of Community Affairs, 919 F.2d 183 (3d Cir. 1990), the Third Circuit rejected the free exercise/freedom of association "hybrid rights" asserted by the religious objector based on the fact that "the present

controversy does not concern any state action directly addressed to religion . . . ." 919 F.2d at 200. For all intents and purposes, this is the same rationale used by the Fourth Circuit in rejecting the Thoburns' free exercise claim. Pet. App. 8a-9a.

The only zoning case cited by the Thoburns is Cornerstone Bible Church v. City of Hastings, U. S. App. LEXIS 26060 (8th Cir. 1991), where the court dealt with an ordinance which excluded churches from a central business district, even though similar non-commercial uses were permitted in the same area. Id. at *6 n.3. In the case at bar all private schools are permitted either as a matter of right or by special exception in virtually all of the County's zoning districts. Pet. App. 49a, 53a-55a; App. 12a-42a. A separate free speech claim, in addition to the free exercise claim, was asserted by the church in Cornerstone. Id. at *5-*13. No such separate claim has been

asserted by the Thoburns. J.A. 1163-1217. The Eighth Circuit did not substantively analyze the "hybrid rights" claim asserted by the church but merely remanded the matter to the district court. Id. at *24. There was no need for the Fourth Circuit to analyze the Thoburns' "hybrid rights" argument either, as it concluded the Thoburns had failed to prove any constitutionally significant burden on the free exercise of religion. Pet. App. 8a.

The Thoburns cite State v. DeLaBruere, 154 Vt. 237, 577 A.2d 254 (1990), in support of its conflict argument. Pet. 19. DeLaBruere is distinguishable on its facts. In any event, DeLaBruere contradicts the Thoburns' own question presented that strict scrutiny must apply in a "hybrid rights" case. Id. at 263 n.10.

III. THE FOURTH CIRCUIT, WHICH CONSIDERED THE EFFECT OF ORDINANCES AND REGULATIONS AS APPLIED TO THE SPECIFIC CONDUCT OF PARTICULAR INDIVIDUALS, DID NOT RESOLVE THE CASE ON ONLY A "FACIAL" BASIS.

The Thoburns' second reason for granting certiorari is based on the fallacy that the Fourth Circuit only viewed their case as a facial challenge. Pet. 20. Contrary to the Thoburns' assertions, the Fourth Circuit never stated that the instant suit was limited to a facial challenge or that it was not deciding an "as applied" case. Pet. App. 1a-23a. Since the Thoburns' argument is based on a faulty interpretation of the Fourth Circuit's decision, their contention that there is a conflict among the circuits is baseless.

The Thoburns disregard the fact that the Fourth Circuit clearly understood that they were arguing that "the zoning and fire safety policies of the county and the town impinged on their first amendment rights to the free exercise of religion." Pet. App. 7a. In

determining that the Thoburns had failed to prove the existence of a constitutionally significant burden, the Fourth Circuit was deciding whether the Thoburns proved any such burden existed in the context of their religious beliefs.

The Thoburns now hinge their entire argument on their assertion that they have been discriminated against because of their religious beliefs. Pet. 22 n.20. In essence, the Thoburns' claim of "discrimination" is more an equal protection challenge than a free exercise challenge. The Thoburns argued to the Fourth Circuit that "where a statute is neutral on its face, an equal protection violation may be shown if there is evidence that the official action was motivated, in whole or in part, by a discriminatory purpose or intent." Brief 32. The Fourth Circuit clearly found that the Thoburns failed to establish any religious animus or adverse disparate treatment by the County.

Pet. App. 8a-11a. Simply stated, the Fourth Circuit, without limiting itself to the facial validity of the County's ordinances and regulations, concluded that there was no proof of discriminatory treatment of the Thoburns.

In response to an offer of proof at trial, the County stipulated that the Board did not take religion into account in denying the Thoburns' SE applications for the Oakton Property. J.A. 1427. The Fourth Circuit noted a "bald reversal of strategy" on the part of the Thoburns when they attempted to argue that the trial court erred in excluding the testimony of county policymakers for the purpose of determining their state of mind when they voted to deny FCS's special exception applications. Pet. App. 16a. The Fourth Circuit noted that at trial the Thoburns contended such evidence was necessary to show that the legislators failed to take religion into account when they voted to deny the special exceptions. Pet. App. 16a.

However, on appeal the Thoburns argued that this exclusion of evidence was improper because the evidence would have shown that the legislators did, in fact, take religion into account. Pet. App. 16a-17a. The Fourth Circuit ruled that the Thoburns cannot be allowed to challenge the trial court's ruling on appeal "on a diametrically opposed position to the only one taken in the district court." Pet. App. 17a. Even though the Thoburns do not challenge this ruling before this Court, their characterizations regarding "harassment" and "discrimination" contain the implicit notion that they continue to assert their "diametrically opposed position" before this Court. It is respectfully submitted that this Court should not give credence to such a reversal in positions by the Thoburns.

IV. PARTIES ASSERTING A FREE EXERCISE OF RELIGION CLAIM HAVE NOT ESTABLISHED A CONSTITUTIONALLY SIGNIFICANT BURDEN ON FREE EXERCISE RIGHTS WHEN THERE IS NO RELIGIOUS BELIEF WHICH PREVENTS COMPLIANCE WITH AN ORDINANCE OR REGULATION.

It is the Thoburns' position that any law, ordinance or regulation which, by its application, poses any obstacle to the opening of a religious school, regardless of religious beliefs, necessarily "burdens" the free exercise of the operator's and students' religious beliefs in a constitutionally significant way. The Thoburns attempt to cloak their failure and/or refusal to comply with reasonable zoning and building regulations under the guise of free exercise of religion. At the same time, they ignore the fact that the problems they had in reestablishing their school, after voluntarily selling their original campus without having a ready replacement, were self-inflicted and unrelated to religion.

Instead of claiming a conflict among the circuits regarding the burden issue, the Thoburns simply assert that "confusion" exists. Pet. 22. The Thoburns' reliance on post-Smith "burden" cases for its assertion of "confusion" is implicitly based on the fallacy that Smith itself broke new ground on the issue of what constitutes a constitutionally significant burden. There is no confusion because the cases cited by the Thoburns for their "confusion" theory: 1) involve governmental requirements which could not be satisfied without prohibiting the exercise of a sincerely held religious belief, and/or 2) do not analyze whether a constitutionally significant burden exists under their facts. Assuming, arguendo, there is any such "confusion," the federal circuits should be allowed time to sort out the issue until, in fact, an intelligible conflict emerges. Thus, it would be premature to grant certiorari in the instant case.

The very cases cited by the Thoburns in support of their Petition are, for all relevant purposes, totally consistent with the decision of the Fourth Circuit. In Thomas v. Review Board, 450 U.S. 707 (1981), this Court stated that when the government

> [c]onditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

450 U.S. at 717-18.

The evidence in the case at bar does not reveal any religious belief which required the Thoburns to take any action which was inconsistent with any of the zoning or building regulations applied by County officials to FCS. In addition, there is no evidence of any religious belief which prevented the Thoburns from complying with any zoning or building regulation applied by

County officials to FCS. As set forth above, there is also no evidence of any religious animus or disparate treatment as to the Thoburns. Moreover, the only laws which were ever applied to the Thoburns by the County were zoning and building regulations which are neutral and generally applicable.[16/]

Just three months before deciding Smith, this Court unanimously upheld a neutral, generally applicable sales tax on the distribution of religious materials, finding that Jimmy Swaggart Ministries had neither alleged nor proven that the mere payment of the tax violated any sincere religious

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16/ When the Thoburns state on page 24 of their Petition that they "were required by law to send their children to school," they imply that part of their "burden" was supplied by the Virginia compulsory school attendance law. See Va. Code §§ 22.1-254 through -266 (1985 and Supp. 1991). Pet. 24. However, there is no evidence that the Thoburns were threatened with any enforcement of that law. Furthermore, there was no evidence that any of the County's actions were motivated by a desire to compel the Thoburns' children

(footnote continued on next page)

beliefs. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391, 392 (1990). This Court reiterated that "'[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" 493 U.S. at 384-385, citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

The Thoburns have admitted that they have no religious objection to all of the specific zoning and building regulations. Pet. 21 n.18. Indeed, there is no evidence

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16/ (cont'd) to attend a public school. Even if state officials had sought to enforce the school attendance law against the Thoburns, Virginia's statute provides a clear exemption, not found in Yoder, for "bona fide religious training or beliefs." Va. Code § 22.1-257(2) (Supp. 1991); see Va. Code § 22.1-256(4) (1985), Pet. App. 37a-38a. In any event, neither the Petition nor the record indicate as to any Virginia statute that the Thoburns have served the Attorney General of Virginia with the notification required by Rule 29.4.

that they have any religious objection to any such regulation. The Thoburns' repeated references in their Petition to the "burden" on their religious beliefs regarding the temporary closure of their school until the building regulations were satisfied are particularly misleading as to the basic building, fire and safety regulations applied to FCS. Pet. 23-25. The reason is that the Thoburns' own evidence clearly established that they agreed to satisfy all such requirements and agreed that they would not open their school until doing so. J.A. 1554, 1556, 1717. The Thoburns have failed to establish how their religious beliefs were "burdened" in any significant way by such regulations because: 1) they admit that they have no religious objections to such regulations; 2) they agreed to comply with those regulations "as applied" to them; and 3) they agreed that they would not open their school (at Hunter Mill) and would voluntarily

suspend classes (in Vienna) in order to satisfy those same regulations.

The Thoburns' final argument regarding the burden issue amounts to an attempt to obfuscate the lack of any nexus between the Fairfax County regulations at issue and their religious beliefs. The Thoburns invite attention to a variety of post-Smith cases which are asserted to reveal "confusion" on the "burden" issue. Pet. 27-29. Contrary to the Thoburns' assertions regarding post-Smith "burden" cases, the cited cases either focus upon a governmental regulation which prevents the exercise of sincerely held religious beliefs or they do not even analyze whether or not a constitutionally significant burden exists in the first place.

The first case cited by the Thoburns on this issue is United States v. Board of Education of Philadelphia, 911 F.2d 882 (3d Cir. 1990), wherein the existence of a burden on the free exercise of religious beliefs was

never a matter of contention. Id. at 889. In Philadelphia a devout Muslim teacher dressed in a manner mandated by her religious beliefs, and the Pennsylvania Garb Statute expressly prohibited such attire. Id. at 884-85. Obviously, the teacher in Philadelphia could not comply with the Garb statute without violating her religious beliefs. Equally obvious is the fact that no such relationship of religious mandate and legal prohibition exists between the Thoburns' asserted beliefs and the County's ordinances and regulations.

The Thoburns next cite Cornerstone Bible Church v. City of Hastings, U.S. App. LEXIS 26060 (8th Cir. 1991). In Cornerstone, the Eighth Circuit ruled that the zoning ordinance at issue had "no impact on religious belief and should not be construed as directly regulating religious-based conduct" and, thereupon, upheld the district court's grant of summary judgment in favor of the city on the free exercise issue. Id. at *21. This

portion of the Cornerstone decision is totally consistent with the ruling of the Fourth Circuit in the case at bar. Later in Cornerstone the Eighth Circuit simply directed the district court to "consider" the Church's "hybrid rights" claim on remand. Id. at *24. Significantly, the Eighth Circuit never found any "burden" and did not decide any "hybrid rights" claim on the merits. The Thoburns' reliance on Cornerstone is clearly misplaced.

The Thoburns next cite State v. DeLaBruere, 154 Vt. 237, 577 A.2d 254 (1990), a Vermont case which is also factually distinguishable from the instant suit. DeLaBruere involved a situation in which a student's parents, members of the Church of Island Pond, were charged with violating Vermont's compulsory education law, which requires private schools to file a certain report with the state. 577 A.2d at 257-58. The parents objected to the reporting requirement on religious grounds, and the

state conceded that "the Church's failure to report to the state [was] motivated by a sincerely held religious belief." 577 A.2d at 261. Unlike DeLaBruere, the Thoburns' evidence affirmatively established that they have no religious belief which prevented them from securing the approval of a special exception or any other zoning, building or occupancy permit.

The Thoburns' reliance upon prisoners' rights cases is similarly misplaced. In Hunafa v. Murphy, 907 F.2d 46 (7th Cir. 1990), the prison policy was in direct conflict with a Muslim's religious belief which prohibited the consumption of pork. In Salaam v. Lockhart, 905 F.2d 1168 (8th Cir. 1990), the existence of a constitutionally significant burden was not at issue because the prison officials did not contest that their policy infringed on the prisoner's free exercise rights. Id. at 1170. In Friedman v. Arizona, 912 F.2d 328 (9th Cir. 1990), cert. denied sub

nom. Naftel v. Arizona, 111 S. Ct. 996 (1991), the Ninth Circuit did not consider the impact of Smith. Id. at 331 n.1. In any event, unlike the County's zoning and building regulations in the case at bar, the prison grooming policy was in direct conflict with the beliefs of Orthodox Jews, who "could not shave their beards without transgressing their religious beliefs." Id. at 329.

Taken together, all of the pertinent authorities accord with the proposition that, to demonstrate a constitutionally significant burden on the free exercise of religious beliefs, a plaintiff must demonstrate a nexus between a governmental regulation which requires/proscribes conduct which is proscribed/required by the plaintiff's religious beliefs. The Fourth Circuit's conclusion that the regulations at issue in this case did not burden the Thoburns' religious beliefs is entirely consistent with these authorities. Pet. App. 8a-9a. There is

no conflict among the cited cases about the nature of a constitutionally significant burden on the free exercise of religious beliefs, and there is, therefore, no reason for this Court to grant the Thoburns' Petition to consider the burden issue.

CONCLUSION

The County Respondents pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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January 14, 1992

APPENDIX

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APPENDIX

Va. Code § 15.1-431 (Supp. 1991)

Advertisement of plans, ordinances, etc; joint public hearings; written notice of certain amendments. - Plans or ordinances or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a reference to the place or places within the county or municipality where copies of the proposed plans, ordinances or amendments may be examined.

The local commission shall not recommend nor the governing body adopt any plan, ordinance or amendment until notice of intention so to do has been published once a week for two successive weeks in some newspaper published or having general circulation in such county

or municipality; provided, that such notice for both the local commission and the governing body may be published concurrently. Such notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than six days nor more than twenty-one days after the second advertisement shall appear in such newspaper. The local commission and governing body may hold a joint public hearing after public notice as set forth hereinabove. If such joint public hearing is held, then public notice as set forth above need be given only by the governing body. The term two successive weeks as used in this paragraph shall mean that such notice shall be published at least twice in such newspaper with not less than six days elapsing between the first and second publication.

When a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or less parcels

of land, then, in addition to the advertising as above required, written notice shall be given by the local commission at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. In any county or municipality where notice is required under the provisions of this section, notice shall also be given to the owner, their agent or the occupant, of all abutting property and property immediately across the street from the property affected which lies in an adjoining county or municipality of the Commonwealth. Notice sent by registered or certified mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed adequate compliance with this requirement. If

the hearing is continued, notice shall be remailed. Costs of any notice required under this chapter shall be taxed to the applicant.

* * *

Va. Code § 15.1-446.1 (Supp. 1991)

Comprehensive plan to be prepared and adopted; scope and purpose. - The local commission shall prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction.

Every governing body in this Commonwealth shall adopt a comprehensive plan for the territory under its jurisdiction by July 1, 1980.

In the preparation of a comprehensive plan the commission shall make careful and comprehensive surveys and studies of the existing conditions and trends of growth, and of the probable future requirements of its territory and inhabitants. The comprehensive plan shall be made with the purpose of guiding

and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants.

The comprehensive plan shall be general in nature, in that it shall designate the general or approximate location, character, and extent of each feature shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.

Such plan, with the accompanying maps, plats, charts, and descriptive matter shall show the commission's long-range recommendations for the general development of the territory covered by the plan, including the location of existing or proposed recycling

centers. It may include, but need not be limited to:

1. The designation of areas for various types of public and private development and use, such as different kinds of residential, business, industrial, agricultural, conservation, recreation, public service, flood plain and drainage, and other areas;

2. The designation of a system of transportation facilities such as streets, roads, highways, parkways, railways, bridges, viaducts, waterways, airports, ports, terminals, and other like facilities;

3. The designation of a system of community service facilities such as parks, forests, schools, playgrounds, public buildings and institutions, hospitals, community centers, waterworks, sewage disposal or waste disposal areas, and the like;

4. The designation of historical areas and areas for urban renewal or other treatment;

5. The designation of areas for the implementation of reasonable groundwater protection measures;

6. An official map, a capital improvements program, a subdivision ordinance, and a zoning ordinance and zoning district maps; and

7. The designation of areas for the implementation of measures to promote construction of and maintenance of affordable housing.

Va. Code § 15.1-491 (Supp. 1991)

Permitted provisions in ordinances; amendments. - A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

* * *

(c) For the granting of special exceptions under suitable regulations and safeguards; and notwithstanding any other provisions of this article, the governing body of any city, county or town may reserve unto itself the

right to issue such special exceptions.

(d) For the administration and enforcement of the ordinance including the appointment or designation of a zoning administrator who may also hold another office in the county or municipality. The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, including the ordering in writing of the remedying of any condition found in violation of the ordinance, and the bringing of legal action to insure compliance with the ordinance, including injunction, abatement, or other appropriate action or proceeding.

* * *

Va. Code § 15.1-496 (1989)

Applications for special exceptions and variances. - Applications for special exceptions and variances may be made by any property owner, tenant, government official, department, board or bureau. Such application

shall be made to the zoning administrator in accordance with rules adopted by the board. The application and accompanying maps, plans or other information shall be transmitted promptly to the secretary of the board who shall place the matter on the docket to be acted upon by the board. No such special exceptions or variances shall be authorized except after notice and hearing as required by § 15.1-431. The zoning administrator shall also transmit a copy of the application to the local commission which may send a recommendation to the board or appear as a party at the hearing. The governing body of any county, city or town may provide by ordinance that substantially the same application will not be considered by the board within a specified period, not exceeding one year.

Va. Code § 15.1-499 (1989)

Restraining, etc., violations of chapter. - Any violation or attempted violation of this

chapter, or of any regulation adopted hereunder may be restrained, corrected, or abated as the case may be by injunction or other appropriate proceeding.

FAIRFAX COUNTY ZONING ORDINANCE

(Reprint 1988; Supp. No. 22, 10/31/88; Supp. No. 26, 12/11/89; Supp. No. 27, 3/26/90)

GENERAL REGULATIONS (ARTICLE 2)

PART I 2-100 SCOPE OF REGULATIONS

* * *

2-102 General Effect

No structure shall hereafter be erected and no existing structure shall be moved, altered, added to or enlarged, nor shall any land or structure be used or arranged to be used for any purpose other than is included among the uses listed in the following Articles as permitted in the zoning district in which the

structure or land is located, nor shall any land or structure be used in any manner contrary to any other requirements specified in this Ordinance.

* * *

PART 3 2-300 INTERPRETATION OF DISTRICT REGULATIONS

* * *

2-304 Special Exception Uses

1. No use of a structure of land that is designated as a special exception use in any zoning district shall hereafter be established, and no existing use shall hereafter be changed to another use that is designated as a special exception use in such district, unless a special exception has been secured from the Board in accordance with the provisions of Article 9.

* * *

COMMERCIAL DISTRICT REGULATIONS (ARTICLE 4)

PART 1 4-100 C-1 LOW-RISE OFFICE TRANSITIONAL DISTRICT

4-101 Purpose and Intent

The C-1 District is established to provide areas where non-retail commercial uses such as offices and financial institutions may be located; to provide for such uses in a low intensity manner such that they can be compatible with adjacent single family detached dwellings; and otherwise to implement the stated purpose and intent of this Ordinance.

4-102 Permitted Uses

* * *

6. Private schools of general education, private schools of special education.

* * *

PART 2 4-200 C-2 LIMITED OFFICE DISTRICT

4-201 Purpose and Intent

The C-2 District is established to provide areas where predominantly non-retail commercial uses may be located such as offices and financial institutions; to provide for such uses in a low intensity manner such that they can be employed as transitional land uses between higher intensity uses and residential uses; and otherwise to implement the stated purpose and intent of this Ordinance.

4-202 Permitted Uses

* * *

6. Private schools of general education, private schools of special education.

* * *

PART 3 4-300 C-3 OFFICE DISTRICT

4-301 Purpose and Intent

The C-3 District is established to provide areas where predominantly

non-retail commercial uses may be located such as offices and financial institutions; and otherwise to implement the stated purpose and intent of this Ordinance.

4-302 Permitted Uses

* * *

7. Private schools of general education, private schools of special education.

* * *

PART 4 4-400 C-4 HIGH INTENSITY OFFICE DISTRICT

4-401 Purpose and Intent

The C-4 District is established to provide areas of high intensity development where predominantly non-retail commercial uses may be located such as office and financial institutions; and otherwise to implement the stated purpose and intent of this Ordinance.

4-402 Permitted Uses

* * *

7. Private schools of general education, private schools of special education.

* * *

PART 5 4-500 C-5 NEIGHBORHOOD RETAIL COMMERCIAL DISTRICT

4-501 Purpose and Intent

The C-5 District is established to provide locations for convenience shopping facilities in which those retail commercial uses shall predominate that have a neighborhood-oriented market of approximately 5000 persons, and which supply necessities that usually require frequent purchasing and with a minimum of consumer travel. Typical uses to be found in the Neighborhood Retail Commercial District include a food supermarket, drugstore, personal

service establishments, small specialty shops, and a limited number of small professional offices.

Areas zoned for the C-5 District should be located so that their distributional pattern throughout the County reflects their neighborhood orientation. They should be designed to be an integral, homogeneous component of the neighborhoods they serve, oriented to pedestrian traffic as well as vehicular. The district should not be located in close proximity to other retail commercial uses.

Because of the nature and location of the Neighborhood Retail Commercial District, they should be encouraged to develop in compact centers under a unified design that is architecturally compatible with the neighborhood in which they are

located. Further, such districts should not be so large or broad in scope of services as to attract substantial trade from outside the neighborhood. Generally, the ultimate size of a C-5 District in a given location in the County should not exceed an aggregate gross floor area of 100,000 square feet or an aggregate site size of ten (10) acres.

4-502 Permitted Uses

* * *

10. Private schools of general education, private schools of special education.

* * *

PART 6 4-600 C-6 COMMUNITY RETAIL COMMERCIAL DISTRICT

4-601 Purpose and Intent

The C-6 District is established to provide locations for retail commercial and service uses which are

oriented to serve several neighborhoods or approximately 20,000 persons. Typical uses to be found in the C-6 District include those uses found in the C-5, Neighborhood Retail Commercial District, and in addition such uses as a variety-department store, a florist, milliner, furniture store, radio and television repair shop, such specialty stores as children's shoes, gifts, candy, lingerie, liquor, women's apparel, book store, children's wear, toys, haberdashery, athletic goods, and a movie theatre.

Development within the district should be encouraged in compact centers that are planned as a unit and preferably confined to one quadrant of an intersection so as to provide for orderly development; maximize comparison shopping; permit

one-stop shopping; minimize traffic congestion; and provide for safe and unimpeded pedestrian movement.

Generally, the ultimate size of a C-6 District in a given location in the County should not exceed an aggregate gross floor area of 400,000 square feet or an aggregate site size of forty (40) acres.

4-602 Permitted Uses

* * *

12. Private schools of general education, private schools of special education.

* * *

PART 7 4-700 C-7 REGIONAL RETAIL COMMERCIAL DISTRICT

4-701 Purpose and Intent

The C-7 District is established to provide locations for a full range of retail commercial and service uses which are oriented to serve a

regional market area containing 100,000 or more persons. The district should be located adjacent to major transportation facilities, and development within the district should be encouraged in centers that are planned as a unit.

Generally, the C-7 District in a given location in the County should contain an aggregate gross floor area in excess of 1,000,000 square feet.

4-702 Permitted Uses

* * *

14. Private schools of general education, private schools of special education.

* * *

PART 8 4-800 C-8 HIGHWAY COMMERCIAL DISTRICT

4-801 Purpose and Intent

The C-8 District is established to provide locations on heavily traveled collector and arterial highways for

those commercial and service uses which (a) are oriented to the automobile, or (b) are uses which may require large land areas and good access, and (c) do not depend upon adjoining uses for reasons of comparison shopping or pedestrian trade.

The regulations of this district are designed to accommodate such uses in a manner that will minimize interference with through traffic movements and insure a high standard in site layout, design and landscaping. Uses should be encouraged to group in preplanned concentrations, and where possible, a minimum distance of three (3) miles should be encouraged between such concentrations.

4-802 Permitted Uses

* * *

16. Private schools of general education, private schools of special education.

* * *

INDUSTRIAL DISTRICT REGULATIONS (ARTICLE 5)

PART I 5-I01 I-1 INDUSTRIAL INSTITUTIONAL DISTRICT

5-I01 Purpose and Intent

The I-1 District presented herein is designed to set forth, to the extent possible, the provisions of the I-1 District of the Zoning Ordinance of the County of Fairfax, Virginia adopted May 19, 1965, as amended.

5-I02 Permitted Uses

* * *

7. Private schools of general education, limited by the provisions of Sect. I05 below.

* * *

5-I05 Use Limitations

* * *

8. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

   A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

   B. All vehicular access to the use shall be provided via the internal circulation system of the park.

   C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

* * *

PART I 5-100 I-1 LIGHT INDUSTRIAL RESEARCH DISTRICT

5-101 Purpose and Intent

The I-1 District is established to provide areas for scientific research, development and training, and offices and manufacturing incidental and accessory to such uses. The district is designed to provide for such uses in a low intensity manner on well-landscaped sites such that they can be located in proximity to residential uses. High performance standards are set forth for the district that will make development within the district compatible with all types of adjoining land uses.

5-102 Permitted Uses

* * *

5. Private schools of general

education, limited by the provisions of Sect. 105 below.

* * *

5-105 Use Limitations

* * *

7. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

   A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

   B. All vehicular access to the use shall be provided via the internal circulation system of the park.

   C. It is determined by the

County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

* * *

PART 2 5-200 I-2 INDUSTRIAL RESEARCH DISTRICT

5-201 Purpose and Intent

The I-2 District is established to provide areas for scientific research, development and training, and offices and manufacturing incidental and accessory to such uses. The district is designed to promote a park-like atmosphere for the conduct of research-oriented activities in structures of good design on well-landscaped sites. High performance standards shall be required for this district that will make development within the district compatible with all types of

adjoining land uses.

5-202 **Permitted Uses**

* * *

6. Private schools of general education, limited by the provisions of Sect. 205 below.

* * *

5-205 **Use Limitations**

* * *

6. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

   A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

   B. All vehicular access to the

use shall be provided via the internal circulation system of the park.

C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

* * *

PART 3 5-300 I-3 LIGHT INTENSITY INDUSTRIAL DISTRICT

5-301 Purpose and Intent

The I-3 District is established to provide areas for scientific research, development and training, manufacture and assembly of products, and related supply activities. This district is designed to accommodate a broad spectrum of clean industries operating under high performance standards.

5-302 Permitted Uses

* * *

8. Private schools of general education, limited by the provisions of Sect. 305 below.

* * *

5-305 Use Limitations

* * *

6. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

   A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

   B. All vehicular access to the use shall be provided via

the internal circulation system of the park.

C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

* * *

PART 4 5-400 I-4 MEDIUM INTENSITY INDUSTRIAL DISTRICT

5-401 Purpose and Intent

The I-4 District is established to provide areas for scientific research, development and training, manufacture and assembly of products, and related supply activities. Basically, the provisions of the I-4 District are similar to those of the I-3 District, but with the addition of some higher impact industrial uses.

5-402 Permitted Uses

* * *

13. Private schools of general education, limited by the provisions of Sect. 405 below.

* * *

5-405 Use Limitations

* * *

6. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

B. All vehicular access to the use shall be provided via the internal circulation

system of the park.

C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

* * *

PART 5 5-500 I-5 GENERAL INDUSTRIAL DISTRICT

5-501 Purpose and Intent

The I-5 District is established to provide areas where a wide range of industrial and industrially-oriented commercial activities may locate. Uses allowed in this district shall operate under medium performance standards designed to minimize the impact of noise, smoke, glare, and other environmental pollutants on the industries within the district and on the neighboring lands of higher environmental quality. The business

and commercial activities allowed in the district will be those which provide services and supplies primarily to industrial companies, those which engage in wholesale operations, and those which are associated with warehouse establishments.

5-502 Permitted Uses

* * *

13. Private schools of general education, limited by the provisions of Sect. 505 below.

* * *

5-505 Use Limitations

* * *

8. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

A. Such use is located in an office or industrial park,

provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

B. All vehicular access to the use shall be provided via the internal circulation system of the park.

C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

* * *

PART 6 5-600 I-6 HEAVY INDUSTRIAL DISTRICT

5-601 Purpose and Intent

The I-6 District is established to provide areas for heavy industrial activities with minimum performance

standards where the uses may require that some noise, vibration and other environmental pollutants must be tolerated, and where the traffic to and from the district may be intensive. This district is intended for use by the largest manufacturing operations, heavy equipment, construction and fuel yards, major transportation terminals and other basic industrial activities required in an urban economy.

5-602 Permitted Uses

* * *

15. Private schools of general education, limited by the provisions of Sect. 605 below.

* * *

5-605 Use Limitations

* * *

7. Child care centers, nursery schools and private schools of

general education shall be permitted by right only when:

A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

B. All vehicular access to the use shall be provided via the internal circulation system of the park.

C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

* * *

SPECIAL EXCEPTIONS (ARTICLE 9)

PART 0 9-000 GENERAL PROVISIONS

9-001 Purpose and Intent

There are certain uses, like those regulated by special permit, which by their nature or design can have an undue impact upon or be incompatible with other uses of land. In addition, there are times when standards and regulations specified for certain uses allowed within a given district should be allowed to be modified, within limitations, in the interest of sound development. These uses or modifications as described may be allowed to locate within given designated zoning districts under the controls, limitations, and regulations of a special exception.

The Board of Supervisors may approve a special exception under the

provisions of this Article when it is concluded that the proposed use complies with all specified standards and that such use will be compatible with existing or planned development in the general area. In addition, in approving a special exception, the Board may stipulate such conditions and restrictions, including but not limited to those specifically contained herein, to ensure that the use will be compatible with the neighborhood in which it is proposed to be located. Where such cannot be accomplished or it is determined that the use is not in accordance with all applicable standards of this Ordinance, the Board shall deny the special exception.

* * *

9-006 General Standards

In addition to the specific standards

set forth hereinafter with regard to particular special exception uses, all such uses shall satisfy the following general standards:

1. The proposed use at the specified location shall be in harmony with the adopted comprehensive plan.
2. The proposed use shall be in harmony with the general purpose and intent of the applicable zoning district regulations.
3. The proposed use shall be such that it will be harmonious with and will not adversely affect the use or development of neighboring properties in accordance with the applicable zoning district regulations and the adopted comprehensive plan. The location, size and height of buildings, structures, walls and

fences, and the nature and extent of screening, buffering and landscaping shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and/or buildings or impair the value thereof.

4. The proposed use shall be such that pedestrian and vehicular traffic associated with such use will not be hazardous or conflict with the existing and anticipated traffic in the neighborhood.

5. In addition to the standards which may be set forth in this Article for a particular category or use, the Board shall require landscaping and screening in accordance with the provisions of Article 13.

6. Open space shall be provided in an amount equivalent to that specified for the zoning district in which the proposed use is located.

7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided. Parking and loading requirements shall be in accordance with the provisions of Article 11.

8. Signs shall be regulated by the provisions of Article 12; however, the Board may impose more strict requirements for a given use than those set forth in this Ordinance.

ORDINANCE STRUCTURE, INTERPRETATIONS AND DEFINITIONS (ARTICLE 20)

PART 3 20-300 DEFINITIONS

* * *

SCHOOL OF GENERAL EDUCATION: A parochial or private school, or a school for the mentally or physically handicapped giving regular instruction at least five (5) days a week, except holidays, for a normal school year of not less than seven (7) months, but not including (a) a school of special education as defined herein; or (b) a child care center or family day care home unless conducted as part of a school of general education; or (c) a riding school, however designated.

* * *

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WARREN E. ISMAN, FAIRFAX COUNTY FIRE MARSHAL, et al.,	:	
Complainants,	:	
v.	:	IN CHANCERY NO. 108263
ROBERT L. THOBURN et al.,	:	
Respondents.	:	

DECREE

THIS MATTER came on before the Court on September 13, 1988, for a further hearing on Complainants' Bill of Complaint for Declaratory Judgment and Injunctive Relief filed with this Court on September 1, 1988; and

IT APPEARING TO THE COURT that Respondents received copies of the Bill of Complaint for Declaratory Judgment and Injunctive Relief, that a preliminary hearing thereon was held September 2, 1988, that a

consent Decree was entered on September 2, 1988 whereby a preliminary injunction was granted, that this hearing was set by agreement of the parties with Respondents to file their response by noon on September 12, 1988, and the parties appeared and were represented by counsel before this Court; and

IT FURTHER APPEARING TO THE COURT after hearing evidence that an Injunction should be granted for the reasons stated on the record and as set forth herein as follows:

1. The case is before the Court on the Petition of the Fairfax County Officials named herein for a temporary injunction, enjoining the Respondents from opening a school.

2. The first issue before the Court for determination is a balancing of hardships. The Respondents contend that there are three hundred prospective students who will be attending this school, that they face prospects of attending no school or being educated at home, or being called on to

compromise their religious beliefs if they were compelled to attend a public school. This must be balanced against the health, the safety and the welfare of those students who will be attending this particular facility. The burden is on the Respondents to show that in no way will the health, safety and welfare of the children be subjected to hazardous conditions. The Respondents have failed to do that. The students would be placed in a hazardous situation; which would be a danger to their health, to their safety and to their welfare. The Respondents are responsible for creating this situation in that they have failed to comply with state and local law.

3. The second issue is the First Amendment freedom of religion issue. The state and county have a compelling interest to protect by law the health, safety and welfare of these children. The testimony of the Respondents' experts and the testimony of the Complainants' witnesses do not show the

facilities to be safe at this time. The Court cannot compromise the safety of these children on the basis of what may be done in the future to improve the facilities and bring them into compliance with local safety laws.

4. The third issue is the equal protection issue. The County law does distinguish between public and private schools but no mention is made of a parochial or sectarian school. Although public schools are not required to obtain a special exception in order to operate, they are subject to various statutory requirements, including, most importantly, public hearings before their locations can be determined and be approved. This requirement for public school sites is equally burdensome to the requirement which is placed on private schools to obtain a special exception permit.

WHEREFORE, upon consideration of these determinations, it is ORDERED and DECREED that:

1. The Respondents, their agents and

employees are hereby enjoined from any further construction activity on the subject property until such time as they secure the proper approval and permits from the appropriate county board, agencies and officials; and

2. The Respondents, their agents and employees are further enjoined from occupying or permitting the occupancy of the residential structures at 1620, 1624 and 1628 Hunter Mill Road, in Fairfax County, for school purposes until further order of the Court.

THIS CAUSE IS CONTINUED.

ENTERED this 27th day of September, 1988.

/SIGNED/
LEWIS HALL GRIFFITH
JUDGE

WE ASK FOR THIS:

DAVID T. STITT
COUNTY ATTORNEY

By /SIGNED/
Karen J. Harwood
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 246-2421
Counsel for Complainants, Warren E. Isman, Fairfax County Fire Marshal; Claude G. Cooper, Director, Fairfax County Department of Environmental Management; and Jane W. Gwinn, Fairfax County Zoning Administrator

SEEN AND OBJECTED TO FOR THE FOLLOWING REASONS:

1. The Decree violates Respondents' rights to free exercise and religion.

2. The Decree violates Respondents' rights to equal protection of the law.

3. The Decree violates Respondents' First and Fourteenth Amendment rights to freedom of speech.

4. The Decree violates Respondents' First and Fourteenth Amendment rights to freedom of association.

5. The Decree violates Respondents' Fourteenth Amendment rights of Substantive Due Process to operate a private school for the benefit of parents and children in the community.

6. The Decree violates the prohibition against prior restraint on freedom of speech, freedom of association, and right to a private education.

7. The Decree violates Respondents' rights because the ordinance is excessively over broad and vague on its face and as applied, and it delegates unfettered discretion to County officials in violation of Respondents' Fourth and Fifth Amendment rights.

ROBERT L. THOBURN, ROSEMARY S. THOBURN, JOHN M. THOBURN and LLOYD L. THOBURN

By /SIGNED/

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